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EMPLOYMENT & LABOR COMMITTEE

April 11, 2007

VIA ELECTRONIC SUBMISSION

Mr. Richard M. Brennan, Senior Regulatory Officer
Wage and Hour Division, Employment Standards Administration
U.S Department of Labor
Room S-3502
200 Constitution Ave., NW
Washington, D.C. 20210

Re: Comments on the proposed revisions to regulations implementing the Family and Medical Leave Act of 1993

Dear Mr. Brennan:

The Association of Corporate Counsel's Employment and Labor Law Committee submits the following comments in response to the Department of Labor's proposed revisions to the regulations implementing the Family and Medical Leave Act of 1993 (the "FMLA"), which were published in the Federal Register on February 11, 2008 at 73 FR 7876.[1]

By way of background, the Association of Corporate Counsel ("ACC") is the largest bar association exclusively serving the professional objectives and goals of in-house counsel to corporations and other private sector organizations. Since its founding in 1982, ACC has grown to represent more than 23,000 individual in-house counsel members who work in more than 10,000 business entities in 75 countries, including significant numbers of members in the US, Canada, Europe, and the Pacific Rim. ACC's Employment and Labor Law Committee ("ELLC" or "Committee") is one of the largest of ACC's committees, with over 5,000 attorney members, many of whom are responsible for the employment-law function of the employers that must comply with the FMLA. As such, our members have become intimately acquainted with the practical issues that arise in implementing the current FMLA regulations. The Committee believes our comments provide the Department of Labor (sometimes "the Department" or "DOL") with the unique perspective of in-house employment counsel regarding fundamental issues concerning the Department's administration of the FMLA and implementing regulations.

[1] These comments are submitted exclusively on behalf of the Employment and Labor Law Committee of ACC and do not reflect the views and opinions of either the individual signatories of this letter or the business entities for whom they work.

The ELLC appreciates and supports the proposed revisions to the regulations and believes they are fair to both employees and employers. The Department's revisions represent an improvement to the existing regulations and provide greater clarity to both employers and employees on the rights and responsibilities afforded under the FMLA. The restructuring and reorganization of information and the new descriptive titles are helpful and make it easier to find information about a particular topic. In addition, the proposed revisions to the regulations incorporate many relevant interpretive judicial precedents and better reflect the true intent of the statutory language. As discussed in more detail below, ACC's ELLC believes that there is opportunity to provide still further clarity in certain areas, particularly in the areas of serious health condition, intermittent leave and the medical certification process. Accordingly we encourage the Department to finalize these regulations, incorporating the changes we suggest below.

Improvements to the Regulations

There are several changes in the proposed regulations that the ELLC finds particularly helpful. First, we strongly support the changes made to align the regulations with the Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.* 535 U.S. 81 (2002) and other case precedent. The categorical penalty provisions in § 825.700(a) and § 825.110(d) of the existing regulations exceed the rulemaking authority of the Department and were properly amended in these proposed regulations. Rather than penalize an employer in all cases when it fails to provide timely notification to an employee of his or her eligibility for FMLA leave or that leave will count against the employee's FMLA leave entitlement, it is more appropriate to consider whether any actual harm has been suffered by the employee in determining if a remedy should be available. Proposed regulation § 825.300(d) and § 825.301(e) do a good job of providing for a remedy only when actual harm has been suffered. In particular, it was helpful for the Department to clarify in § 825.301(e) that harm is not suffered when an employee is prevented from returning to work due to his or her own illness regardless of whether the employer provides timely notification.

The Department's clarification in § 825.220(d) relating to waivers is also useful. The ELLC agrees that while an employee may not prospectively waive his or her rights under the FMLA, an employee and employer should be allowed to settle past FMLA claims without the need for court or Department of Labor approval. While the current regulation should be read to apply only to the prospective waiver of claims, in light of decisions such as *Taylor v. Progress Energy*, we believe the clarification provided in the proposed revision is important and more fully consistent with statutory language.

ACC's ELLC further believes that the provisions relating to employee notification requirements are much more clear and fair under the proposed revisions. Under the current regulations, it was unclear exactly what type of information must be shared by the employee to put an employer on notice of the need for FMLA leave, and some courts established such a lenient standard that employers were asked to be mind readers. Proposed regulation § 825.302(c) and § 825.303(b) address this problem by requiring

employees to provide sufficient information to put the employer on notice that the leave may be FMLA-qualifying, and by obligating employees to respond to follow-up inquiries designed to determine whether the absence is FMLA-qualifying. We agree that while employees should not be required to name the statute to assert rights under it in all cases, they should be required to provide enough information to allow the employer to understand if the FMLA might be implicated. In particular, we appreciate the clarification in § 825.303(b) that calling in "sick" without providing more information will not be sufficient notice. We believe that the increased specificity required will help employers identify potential FMLA-covered leaves and will help employees get their leaves protected by the FMLA.

While we agree that requiring employees to reference the FMLA when requesting leave in all cases is not appropriate, ACC's ELLC would encourage the Department to consider requiring an employee to reference the FMLA when he or she has previously taken leave for an FMLA-qualifying event and then needs additional leave for that same condition. This is particularly helpful when an employee is taking intermittent leave for a chronic condition. For example, if an employee has been approved for intermittent leave for asthma flare ups, when the employee needs to take leave for such a purpose, it would be helpful to require them to identify that they are taking FMLA leave for their asthma. Similarly, if an employee takes FMLA leave for surgery and then needs intermittent leave for follow-up physical therapy, it would be easier to have the employee reference the prior FMLA leave specifically. The burden imposed on employees by this requirement is very low as they will be familiar with the FMLA due to their initial request for leave. The benefit to both the employer and employee is great since it will streamline the request process, provide clarity to both parties that the leave will be designated as FMLA-qualifying leave and will avoid much of the ambiguity that currently exists when someone is approved for intermittent leave and calls in an absence.

The proposed regulations also do a good job of addressing the timing of an employee's notification when they have less than 30 days' advance notice of the need for leave or when the leave is unforeseeable. Under the current regulations, the "one to two business days" was often mistakenly read to be the minimum notice period allowed in cases where there was less than 30 days' advance notice, even if there was more than one to two days of advance notice. The proposed regulation § 825.302(a) addresses this by removing the "one to two business days" language and by requiring the employee to explain the reasons why notice was not practicable sooner. This will help employers plan for absences in the least disruptive manner possible and is fair to employees as it merely requires them to provide notice when they are able to do so. The example provided in § 825.302(b) is useful in showing that practicable means that the employee must provide notice at the earliest opportunity possible under the circumstances, not when it is convenient for them.

The changes on the timing of employee notice for unforeseen leave are also beneficial and consistent with statutory intent. In particular, we appreciate the clarification in § 825.303(a) that the notice must be prompt, as well as the commentary by the Department

that in all but the most extraordinary cases, employees should provide notice before the start of their shift.

ACC's ELLC also greatly appreciates the revisions to § 825.302(d), which allow employers to enforce their call-in procedures. The current regulations indicate that while an employer could theoretically require an employee to follow its usual and customary notice and procedural requirements for requesting leave, the employer could not delay or deny leave if the employee failed to do so, thus creating no real way to require employees to follow the employer's policies. Proposed § 825.302(d) now allows employers to delay or deny FMLA leave when an employee fails to follow employer procedures, absent unusual circumstances. As many employer groups, including ACC, have previously indicated, employer call-in procedures are critical to an employer's ability to manage absences while ensuring appropriate staffing. Allowing employers to treat employees taking FMLA leave the same as other employees is important in allowing them to manage these absences while maintaining business continuity. The burden imposed on employees by this change is minimal since they should be well aware of their employer's policies and since they are simply being held to the same standards as other employees. In addition, exceptions for unusual circumstances will be allowed. In light of the significant benefit to employers, we strongly support this change.

In addition, ACC's ELLC supports the clarifications offered by the Department as to how the FMLA interacts with paid leave. We agree with the Department's commentary that current § 825.207 is confusing to employers and employees as to how paid leave and FMLA leave interact with one another. It is important for employees to be able to use paid leave while on FMLA leave and, in fact, many employees may be financially unable to avail themselves of the FMLA without such payments. The proposed revisions go a long way towards protecting this right for employees while allowing employers to hold such employees to the same standards as individuals who take paid leave under non-FMLA circumstances. Specifically, the Committee supports the Department's decision to delete § 825.207(h), which prohibits employers from requiring employees from meeting FMLA standards when their leave policies provide for less stringent standards, and to delete § 825.207(e), which prohibits an employer from placing any limits on the substitution of leave.

Finally, ACC's ELLC supports the following further revisions to the regulations:

- Proposed § 825.110(b)(1), which provides that breaks in service of five years or more need not be counted when establishing if the employee has worked 12 months unless the break is due to military leave or pursuant to a written agreement.
- Proposed § 825.115(c)(2), which allows an employer to deny the payment of a bonus that is based on a goal, including hours worked or attendance, if the employee fails to achieve that goal due to his or her FMLA absence.
- Proposed § 825.300(b) and (c), which gives employers 5 days to provide notice of eligibility and of designation of leave as FMLA-qualifying instead of 2 days.

Additional Changes to Consider

While ACC's ELLC views the proposed revisions to the FMLA regulations as an improvement over the current regulations in many respects, we believe there are a few areas where the Department could have provided further guidance to help employers administer the FMLA in a manner that is fair to both employees and employers. We encourage the Department to consider whether the following topics warrant further consideration.

Intermittent Leave

Despite the many helpful additions to the proposed regulations, we are disappointed the Department did not decide to expand the existing regulation under § 825.204 stating that "an employee [who] needs intermittent leave or leave on a reduced leave schedule that is foreseeable . . ." may be transferred to an "alternative position" to include employees taking unforeseeable intermittent leave.

The intent of this regulation, as the agency noted in the discussion in the Preamble to the current regulations regarding Congress' purpose in this area, is that employers be given greater latitude in their ability to staff and handle their workload, while ensuring employees are not penalized for taking FMLA time: "As the legislative history explains, this provision was intended to give greater staffing flexibility to employers by enabling them temporarily to transfer employees who need intermittent leave or leave on a reduced leave schedule to positions more suitable for recurring periods of leave. At the same time, it ensures that employees will not be penalized for their need for leave by requiring that they receive equivalent pay and benefits during the temporary transfer."

While being able to transfer an employee on foreseeable intermittent or reduced leave FMLA is helpful for employers, the impact of unforeseeable intermittent leave is even greater because of the inability to forecast when employees will be available to work. As a practical matter, it is cases of unforeseeable intermittent leave where the new regulation is most necessary, as it is in those cases that the employee's leave causes the most disruption to an employer. In most cases, even an employee's notice of need for leave merely before a shift starts is not enough time for employers to backfill their positions for the day – especially in jobs where a substitute is not readily available at a moment's notice or for only an intermittent block of time. We appreciate that the current regulations state that employees must make a reasonable effort to schedule leave so as not to disrupt an employer's business, but in cases of unforeseeable leave, employees may not be able to do so.

For the same reasons, we feel the Department should have considered allowing an employer to count an entire shift against an employee's intermittent leave entitlement where the employee's leave, even if for a shorter period of time, effectively prevents them from working the shift. Practical examples of this occurrence abound in a wide variety of industries – a flight attendant who misses a flight, security personnel, customer

service employees in construction and other industries who must perform emergency repairs, etc. In these cases, particularly in the case of unforeseeable leave, an employer must call in a replacement employee to work the entire shift. Not allowing the employer to count the entire shift as intermittent leave imposes significant costs on employers.

When an employee takes unforeseeable intermittent leave, those instances are when employers are most left in the lurch in terms of staffing. If the Department allows the transfer of an employee taking foreseeable intermittent leave to an alternative position in order to help employers better staff their workforces, it would stand to reason that the Department should allow the same for unforeseeable intermittent leave. Therefore, we respectfully request that the Department include unforeseeable intermittent leave under § 825.204 and allow employers to transfer employees taking such unforeseeable intermittent leave to an alternative position.

Serious Health Condition

In light of the fact that the Department identified that it "has struggled with th[e] definition" of "serious health condition" and the "Department received significant commentary about its changing interpretations of the definition of serious health condition in response to its RFI"[2], ACC's ELLC is disappointed that the Department failed to address many of the legitimate concerns of employers and employees alike concerning the definition of "serious health condition." As such, we reaffirm our request that the Department take a more reasoned approach to this vague, confusing, and overbroad definition. We agree with other commentators that the Department needs to take additional steps to limit the definition of serious health condition to what was originally intended by Congress. We urge the Department to reconsider its position and commit to an "alternative approach to the definition that would still cover all the types of conditions Congress intended to cover under the FMLA." *See* 72 FR at 7885. While we appreciate that the Department has attempted to reorganize the structure of the definition so both employees and employers can better understand what constitutes a serious health condition, we believe that the definition in the proposed regulation will continue to cause confusion to both employers and employees alike.

As referenced in our previous comment, one way to address minor illnesses such as "the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc.," which the Department acknowledges were never intended to be covered, is to modify the definition of "regimen of continuing treatment" to exclude nominal treatments such as a short course of prescription medicine. This change would not only align with the stated intent to not cover minor illnesses, but will avoid encouraging employees to request, and medical professionals to provide, unnecessary prescriptions in order to meet the definition of a serious health condition. We also ask that the Department clarify that "treatment two or more times . . . by heath care provider" does not include simple follow-

[2] *See* Chapter III of the Department's 2007 Report on the RFI comments at 72 FR at 35563, *See also* 73 FR at 7878 and 73 FR at 7885.

up care to review the efficacy of previously prescribed medication or to review lab results.

Medical Certifications

The ELLC appreciates the attention the Department has focused on the medical certification requirements and the proposed form itself. The current form is lengthy and complicated, as evidenced by the fact that well educated health care professional have difficulty completing the form. As for the content of the form, the ELLC appreciates that it may now ask for a diagnosis. Previously, it was awkward for health care professionals to complete this form without providing a diagnosis, and such information is helpful to the employer in understanding an employee's need for leave. We also agree with the Department that an employer should be able to provide information to the health care provider to assist in the completion of the certification and to focus attention on essential aspects of the certification such as the expected frequency and duration of the need for leave. Specifically authorizing the employer to provide a list of essential functions or job description is useful, so long as the health care provider must specify which, if any, functions the employee cannot perform. Authorizing the employer to provide a description of an employee's absences to the health care provider is also helpful, so long as the health care provider would then be required to certify whether these absences are consistent with the employee's serious health condition.

Setting a specific time frame for the return of the medical certification is essential to the administration of FMLA leaves and to staffing businesses. Accordingly, we support the Department's decision to apply the 15-day timeline for returning medical certifications for both foreseeable and unforeseeable leaves. We also agree that if an employee fails to return the certification after this time, it should not be considered an incomplete form and an employer should be able to deny leave for failure to return the form. We do not think that the employer should have the burden of having to remind the employee of the need to return the form and then give them extra time to do so. Rather, the employee is in the best position to follow up with his or her health care provider to ensure that all needed information is provided in a timely manner. If any additional time is given, it should only be done when the employee requests additional time before the end of the 15-day period. In that case, it would be reasonable to allow one additional 7-day period to return the form. For incomplete forms, we appreciate the additional clarity provided by the proposed regulations on what an employer should do to obtain the additional information needed, and we concur that an additional 7-day period to obtain such information is appropriate.

Requiring employees to provide certification in order to utilize FMLA leave, even if a paid leave policy has less stringent requirements, also helps separate the purpose of the FMLA leave from any income replacement benefits that may be utilized by the employee. As such, we support this change made in the proposed regulations.

Further, we appreciate that an employer can now contact health care providers directly to authenticate and clarify the medical certification if the employee consents. At this time, relying on the employee to translate requests for clarification results in unnecessary expense to the employee and leaves the employee in limbo, not knowing whether his or her leave is approved or not. Doubt and confusion could be further reduced if employees were required to authorize the employer to talk to the health care provider on a limited basis and only about the FMLA illness. We appreciate the further clarification on the interaction between HIPAA and the FMLA, and the guidance that an employee's failure to agree to allow a health care provider to submit information needed for the medical certification may result in a denial or delay of FMLA leave.

As for the "clarification" allowed, employers, employees and health care providers need a broad definition of "clarification" of the information in the medical certification form. The current proposal is limited and somewhat unclear as to what exactly an employer is allowed to request when authenticating and clarifying a medical certification. The final regulations should make it clear that it is appropriate for an employer to discuss with the health care provider the need for leave, as well as obtaining additional information needed to understand when and how an employee might need to take leave for their serious health condition. This will serve to benefit both employees and employers in that it will increase the understanding of both parties as to what type of leave is truly needed.

An issue that arises frequently is the inability to recertify intermittent or reduced hours leaves of absence. Certainly, allowing recertification every six months is helpful. Given that under the FMLA leaves are available for up to 12 weeks in a 12 month period, allowing recertification every 12 weeks would be more consistent with the statute. Further, more frequent feedback to the health care provider in the form of attendance records and essential job functions would be useful for both the employee and their health care provider.

We encourage the department to consider at least three separate medical certification forms: one for medical reasons (an employee's own serious health condition); a second form for family care leave (to care for an immediate family member with a serious health condition); and a third for military family care (to care for a seriously ill or injured service member). Doing so would avoid confusion and ease both the completion of the form and the administration of the leave. Further, military family care leave utilizes a different standard – a serious illness or injury as opposed to a serious health condition.

Employer Notification Requirements

There have been some improvements made to the employer notification obligations under the proposed regulations. In particular, we appreciate that the Department consolidated all employer notification requirements into one section, and we believe that it was helpful to specifically identify the different types of notice required. However, the ELLC believes that some of the new requirements are overly burdensome and should be reconsidered.

For the general notice provision, we agree that it is reasonable to ask employers to post a notice explaining the FMLA in a prominent place, either on site or electronically. However, we believe that the requirement in § 825.300(a)(3) to either distribute the general notice in a "handbook" or distribute a copy of the notice annually to be confusing and overly burdensome. Specifically, it is unclear whether an employer can avoid the annual distribution of the notice by including it in an electronic collection of policies, such as those posted on a company Intranet, and whether that will be considered a "handbook." Additional clarification on this point would be helpful. If an employer posts the notice in a conspicuous place that is available to all employees (either on site or electronically), it seems unnecessary to require an annual distribution of the policy, especially given the administrative costs this would impose on the employer.

With respect to the designation notice, the ELLC respectfully asks the Department to reconsider the requirement that an employer send a notice to employees every 30 days telling them how much leave has been designated when leave is taken intermittently. As noted by the Department, an employer will be unable to identify up front how much leave will be taken when the request is for intermittent leave because the employee does not know this information. However, asking the employer to provide updates on the amount of leave taken every 30 days creates a significant administrative burden on employers and provides minimal, if any, value to employees. If employees are using intermittent leave legitimately, they should only be taking leave when needed for their serious health condition (or the serious health condition of a family member), regardless of how much FMLA leave the employee may have left. Requiring monthly updates on the amount of leave taken seems to suggest that employees might somehow alter the amount of leave taken in the future based on the amount of FMLA leave remaining. This type of manipulation should not happen in legitimate cases of FMLA leave. Indeed, as the previous comments submitted by multiple employer organizations indicate, the abuse of intermittent leave is a significant concern to employers. Imposing a requirement that could be used to facilitate such abuse is troubling to the ELLC given the minimal value of such a requirement. Thus, this requirement should be removed from the final regulations. If the Department feels strongly that some type of notice is necessary, it should instead ask employers to give an employee notice when they have less than 2 weeks of FMLA leave remaining. This would help employees understand when they are approaching the end of their FMLA leave entitlement, impose a lesser burden on employers, and be less likely to result in manipulation and abuse in taking intermittent leave.

New Military Leave

The Department has requested input on a number of issues related to the new military leave provisions that were recently added to the FMLA. The ELLC and its members have the utmost respect for service members and their families, their sacrifices, hardships and dilemmas and we support the passage of H.R. 4986, which provides leave to family members when they are needed to care for members of the military who are injured in the line of duty or when they need to deal with exigent circumstances caused by a loved

one's call to active duty. Our suggestions are offered to help the Department implement these new statutory requirements in a way that is fair and clear for both parties while preserving the full rights afforded to those family members under the new statutory amendments.

Covered Service Member Definition

First, the Department requests comments on the definition of "covered servicemember," including seeking comments on how to determine what it means to be "undergoing medical treatment, recuperation, or therapy for a serious injury or illness." The ELLC does not believe that the Department should impose a temporal proximity requirement between the date of injury and the treatment, recuperation or therapy for which care is required to meet this definition since any time limitation imposed would be artificial and could deny leave to the family of service members who are undergoing care for an injury caused in the line of duty. However, because it is important to establish a causal connection between the care provided and the military service, we do believe that the Department should limit the definition to include only care provided by the Armed Forces, including Veterans hospitals and those to whom the Armed Forces has delegated the task of providing health care. Treatment and therapy that falls outside of this definition would be less likely to be connected to the service member's military service, and therefore would less likely fulfill the purpose of H.R. 4986. We view this limitation to be much more fair to employees than a temporal proximity requirement as it is more closely aligned with the goals of the statute – to provide leave to family members when their loved one is seeking treatment for an injury sustained in the line of duty.

Next of Kin Definition

Next, the Department seeks comments on the definition of "next of kin." The ELLC believes it is important that a singe definition be adopted. Relying on differing state law definitions would pose an administrative nightmare for employers who are located in multiple jurisdictions and would offer no benefit to employees, who would likely be confused by different rules. Also, if the service member and family member are located in different states, there would be further confusion as to which law applied. As for which definition to adopt, we believe that any reasonable definition could be workable. However, we have concerns that the Department of Defense's definition may not be the most appropriate definition since it focuses on notifying family members in the case of death and, thus, does not align in all cases with the goals of the military leave statutory amendments. For example, we would think that parents should generally take priority over children since minor children would not likely be in a position to request leave. Also, the Department of Defense definition includes spouses, which are not blood relatives and would not meet the definition of "next of kin" in the statute.

We do believe that there should only be one "next of kin" for each service member since the statute clearly indicates that "next of kin" includes the nearest blood relative, implying that only one person can meet the definition. If such person is unwilling or

unable to provide care, another person should not be substituted. To do so would run counter to the statutory language. In cases where there may be several relatives at the same level of consanguinity (such as siblings), the nearest blood relative should be the first person who applies for caregiver leave. While only one "next of kin" should be allowed to take leave for a covered service member, the statute does indicate that anyone who is also a parent, spouse, son, or daughter would also be eligible to take leave. Therefore, it would be possible for more than one family member to take leave to care for the injured service member if they fall into one of the other statutory categories.

As for certifying who the "next of kin" is, we believe it would be helpful if employers could rely on such a certification, but we are not sure what entity would have authority, knowledge and infrastructure to issue such a certification. At a minimum, it would be helpful if employers could require a signed statement from the service member or their legal representative attesting that the employee is his or her nearest blood relative and certifying that no one else will take leave as the service member's next of kin.

Service Member Family Leave Certification

Next, the Department seeks comments on how to certify whether service members have suffered a serious injury or illness that renders them unfit to perform the duties of their office, grade, rank or rating. The ELLC concurs that the Department of Defense or Veterans Affairs is in the best position to make this determination for those service members whose injuries become apparent while they are on active duty, and a certification from that agency would be appropriate. For those who are still in the military but who are no longer active, the Department of Defense can look to the last active duty position held. For individuals whose injury does not manifest itself until after they have left military service, the Department of Defense or Veterans Affairs would not be in the best position to determine if they are unable to perform their military duties as there are no duties to be performed. Indeed, it would seem that such individuals should not be covered by the new leave provision since they do not meet the definition of "serious injury or illness." We suggest that the Department clarify this issue in the regulations to exclude such individuals from coverage. Further, we believe that a separate certification that addresses whether the family member is needed to care for the service member should be allowed, and that the service member's health care provider is in the best position to provide that certification.

A certification identifying the need for service member family leave should contain the following:

- The nature of the serious injury or illness
- Its estimated duration
- That it was incurred in the line of duty while on active duty in the Armed Forces
- That the serious injury or illness renders the service member medically unfit to perform the duties of their office, grade, rank or rating

- That the service member needs the care from the family member during their treatment, recuperation or therapy and why the family member is needed

The information in the certification should be provided by the service member's health care provider and the Department of Defense or Veterans Affairs, as discussed above. As for the timing requirements for returning this certification, we believe the Department of Defense is in the best position to identify the time needed to provide this information. We believe that employers should be able to contact the Department of Defense, Veterans Affairs and/or health care provider to confirm the information in the certification form. The current rules for recertification, second opinions and third opinions should also apply to this type of leave.

Qualifying Exigency Definition

As for how the Department should define "qualifying exigencies," the ELLC believes that this term should be defined to include only urgent and one-time emergency needs that arise from the service member's call to active duty and to exclude everyday life occurrences. The exigency should be caused directly by the deployment of the family member. It would be extremely helpful to develop a list of pre-deployment, deployment and post-deployment activities that meet the definition of "qualifying exigencies." This would provide the most clarity to both employees and employers and would provide the best chance at ensuring that employees are given leave for certain types of activities. The Department of Defense should be consulted in this process to ensure that all true exigent circumstances are included. We also suggest that the Department create guidelines for the amount of time that can be taken for a particular type of exigent circumstance. For example, the Department could identify that an employee could take up to 5 days to secure childcare when the service member was the primary childcare provider prior to being called to active duty. While not all exigent circumstances may be amenable to such timelines, providing guidance in areas where it is possible to do so would provide the maximum clarity to both parties as to when an exigent circumstance arises and for how long it should last.

The ELLC believes that the following circumstances should be included as exigent circumstances when they are directly caused by the service member's call to active duty:

- Time to make alternate childcare arrangements when the service member provided such childcare prior to their military leave
- Time to make financial and legal arrangements to account for the service member's leave when directly related to the military leave
- Attendance at official ceremonies or programs where participation is requested by the military
- Attendance at farewell or arrival arrangements for a service member
- Attendance to affairs caused by the missing status or death of a service member

We do not think that everyday life occurrences should be covered. For example, if the service member has been the primary childcare provider, while it makes sense to provide for a limited amount of leave needed to secure other childcare, an employee should not be able to use this leave to substitute himself/herself as the primary childcare provider during the military leave. Similarly, while a family member may need time to ensure that a power of attorney and will are drafted, time off to pay bills should not be covered. Making this distinction is important to ensure that the statutory term "exigency" is given its true meaning. As the Department notes, this term encompasses only urgent matters that require immediate aid or action.

Certification for Qualifying Exigencies

A certification documenting the exigent circumstance should be required. The certification should include a statement identifying the need for the exigency leave, the expected duration of the leave and an explanation of how the leave is caused by the service member's call to active duty, along with documentation to support the needed leave. For example, an invitation to a farewell event or a statement from a childcare provider or financial services provider should be allowed. The documentation required will vary based on the type of exigency at issue. In addition, a statement from the Department of Defense indicating that the service member was called to active duty in support of a contingency operation and the expected dates of military service should be required. Further, the regulation should not prevent the employer from verifying the certification by calling the Department of Defense to confirm the call to active duty, or to contact the third parties involved in the exigent need. For example, the employer should be able to call the childcare provider to confirm that they were consulted to provide care as a result of a service member's call to duty. The fifteen day time period provided for other types of FMLA leave should be sufficient time for an employee to provide the information requested in the certification form. The employee should bear the cost of obtaining such certifications, consistent with the current regulations.

Calculating Leave Entitlements

The Department seeks comments on how to interpret the "single twelve-month period" allowed for family members who are needed to care for injured service members. We believe that the statutory language in Section 102(a)(3) is clear that an employee is entitled to take only one 26-week period for service member family leave and that such leave must occur over a 12-month period. If this was not the intent, Congress would not have included the phrase "single twelve-month period" in this section. Indeed, they chose not to include such a limitation in Section 102(a)(1), which allows an employee to take 12 weeks of leave every 12 months. Allowing an employee to take more than one service member family leave would run counter to the express language of the statute. This rule should apply regardless of the number of service members who may need leave and/or the number of injuries suffered by a service member. That is, each employee is entitled to no more than 26 weeks over a single twelve-month period for service member family leave pursuant to Section 102(a)(3).

As for how to calculate when the twelve-month period runs for family service member leave, ACC's ELLC believes that the Department should use the same standard provided for in the regulations for other leave; that is, employers should be allowed to choose how they calculate the twelve-month period, provided that they inform employees in advance of the method they will use. The period chosen by the employer need not be the same as the period chosen for the other types of leave provided for in Section 102(a)(1) and, in fact, some of the options currently provided do not make sense to use for military leave. For example, since family service member leave should only occur over a single twelve-month period, using a rolling period would not make sense. If the Department chooses to adopt a single standard, we suggest looking at the date the employee first takes leave in calculating when the twelve-month period runs.

When determining whether an employee has exceeded their FMLA leave entitlement, the Department should make it clear that during the 12-month period when an employee is taking service member family leave, if they have a need to take other FMLA leave, the total amount of leave taken during the 12-month period should not exceed 26 weeks and the two types of leave will run concurrently. If their other FMLA leave extends beyond the 12-month period established for service member family leave, they might be able to take that additional leave if they are otherwise eligible to do so under the other 12-month period applied by the employer.

When a leave may count as either service member family leave or leave taken to care for a spouse, parent or child, the employer should be able to determine how such leave should be designated, including allowing the two types of leave to run concurrently. This aligns with the intent of the statute to limit the overall amount of leave taken in one year to 26 weeks, while giving the employer flexibility to be more generous if it chooses to do so. If this approach is not adopted, the default should be to apply the service member family leave first and to limit the total leave entitlement in the 12-month period to 26 weeks. The ELLC believes that the Department should allow the employer to change the initial designation of the leave retroactively. This should not impact employees as the only consequence would be to limit the leave in the 12-month period to 26 weeks, which is what the statute provides, and the benefit is that a retroactive designation could provide for more generous leave to the employee.

Intermittent and Reduced Schedule Leave

When leave is taken intermittently or on a reduced leave schedule, the Department should allow employers to transfer an employee on a temporary basis to a job that better accommodates such leave, as is permitted under the current FMLA statute and regulations for other FMLA leaves. There is no reason to treat military leaves differently, as such leave is likely to raise the same concerns by employers as they seek to provide full rights to their employees while maintaining business continuity and productivity. As noted above, we believe the ability to transfer employees should apply to both foreseeable and unforeseeable leave.

Employee Notifications

As for when the employee must notify the employer of his or her need for military-related leave (both service member family leave and exigency leave), the current rules should be applied. That is, when the leave is foreseeable, notice should be provided as soon as practical and with at least 30 days' advance notice when there is more than 30 days of advance notice. Therefore, we support the Department's suggestions to apply the same employee notice requirements to this type of leave. We also believe that employees should be required to provide sufficient information to the employer to allow it to understand that the leave might be FMLA-qualifying.

Conclusion

ACC's ELLC thanks the Department for this opportunity to provide feedback on the proposed revisions to the FMLA regulations and commend the Department for its efforts to provide greater clarity to employees and employers on the rights afforded under the statute, as well as its efforts to ensure that the regulations are fair and align with statutory intent and case precedent. We hope that the Department considers our suggested changes, including our comments on the new military leave statutory amendments, and finalizes the changes it has proposed.

Sincerely,

ASSOCIATION OF CORPORATE COUNSEL
Employment and Labor Law Committee

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